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CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. 1900. 1902.

No 582. 2060. 54

METCALF BROTHERS & COMPANY, PETITIONERS,

vs.

BENJAMIN BARKER, JR., TRUSTEE IN BANKRUPTCY OF LESSER BROTHERS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MARCH 11, 1901.

(18,077.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 592.

METCALF BROTHERS & COMPANY, PETITIONERS,

vs.

BENJAMIN BARKER, JR., TRUSTEE IN BANKRUPTCY OF LESSER BROTHERS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 10, 1901.

1 United States Circuit Court of Appeals for the Second Circuit.

Present: The Honorable William J. Wallace, E. Henry Lacombe and Nathaniel Shipman, circuit judges.

In the Matter of LESSER BROTHERS, Bankrupts.

Petition of Metcalf Brothers & Co. to Superintend and Revise in Matter of Law Proceedings of the District Court of the United States for the Southern District of New York.

Certification of questions to the Supreme Court under the acts of March 3, 1891, and of July 1, 1898.

This matter came before this court upon a petition of Metcalf Brothers & Co. to superintend and revise in matter of law certain proceedings of the district court of the United States for the southern district of New York, wherein an order was made by said district court enjoining the petitioners, Metcalf Brothers & Co., from taking any further proceedings under any judgment obtained by them in the supreme court of the State of New York in a judgment creditors' action wherein certain transfers made by the bankrupts had been set aside as to them as fraudulent and void, and wherein re-
2 ceivers of the property of the bankrupts appointed by the said supreme court had been directed to pay to them the amount of their judgments at law upon which their said judgment creditors' action was founded.

For its proper decision of the matter this court desires the instruction of the Supreme Court upon the questions of law hereinafter stated, and hereby certifies the same to the Supreme Court of the United States for that purpose.

Statement of Facts.

On the 2d of October, 1896, Lesser Brothers, subsequently adjudged bankrupts, who were copartners, being then insolvent, transferred all their property, copartnership and individual, to certain favored creditors. All their outstanding accounts, being copartnership property, they transferred by instruments of assignment to Marcus A. Adler and others. They confessed various judgments in the supreme court of the State of New York in favor of Bernhard Moses and others, upon which executions were at once issued to the sheriff of the county of New York, who levied thereunder on all their tangible personal property, consisting of clothing material and stock in trade. This also was copartnership property, and, with the book accounts, comprised all their property except a piece of real estate owned by Israel Lesser individually and a ground
3 lease of another piece of real estate owned by Tobias Lesser individually. These two pieces of real estate the individuals owning them conveyed to Joseph Lilienthal.

After making these transfers and after the levy by the sheriff under the executions issued upon the confessed judgments and on the same day, by a fraud upon the court, in a collusive action in the supreme court of New York to dissolve the partnership, they procured the appointment of a receiver of the partnership property, Morris Moses, who was nominated by and in collusion with them. Subsequently a receiver nominated by certain creditors, James T. Franklin, was associated with Mr. Moses by the same court.

Various creditors of the bankrupts immediately commenced actions of replevin to recover portions of the goods in the hands of the sheriff. Their claims were conflicting with each other and with those of the confessed-judgment creditors, and in an action brought in the supreme court of New York by the receivers an order was made restraining the sale by the sheriff under the executions, directing a sale by receivers (Mr. Moses and Mr. Franklin being also appointed such receivers in that action), and that the latter should hold the proceeds of the sale subject to the claims of all parties, such claims to be determined in that action. Pursuant to this order, the goods were sold, and the receivers so appointed now hold the proceeds thereof. This order was made November 23, 1896. The action is still pending, undetermined.

4 On the 22nd day of October, 1896, and the 29th day of October, 1896, Metcalf Brothers & Co. procured judgments in the supreme court of the State of New York against the Lessers for $930.21 and $2,547.80 respectively, upon which executions were issued and returned unsatisfied.

On the 17th day of December, 1896, Metcalf Brothers & Co. commenced a judgment creditors' action in the supreme court of the State of New York, which came to trial on the 17th day of December, 1897, and as a result of which the transfers to which reference has been made and the proceedings for the appointment of the receivers were adjudged fraudulent and void as to them. The court, however, set aside the transfers of the copartnership property, not only in favor of Metcalf Brothers & Co., but also in favor of the receivers. It set aside the transfer of the real estate in favor of Metcalf Brothers & Co. alone. Judgment was entered on this decision April 6, 1898.

This judgment determined that the proceeds of the sale of the tangible property then in the hands of the receivers and the outstanding accounts or their proceeds in the hands of the transferees (to be accounted for under the judgment to the receivers) were to be administered by the receivers for the benefit of all the creditors of the copartnership equally, including Metcalf Brothers & Co., while the real estate transferred became subject to the lien of the judgments of Metcalf Brothers & Co. on October 22nd and 29th,

5 1896.

All parties except the receivers appealed from this judgment to the appellate division of the supreme court of New York; that court affirmed the judgment of the trial court as to the fraud, but reversed it in so far as it granted relief in favor of the receivers.

It directed the payment by the receivers to Metcalf Brothers & Co. of the amount of their judgments out of the money in the receivers' hands, and, since Metcalf Brothers & Co. were to be so paid, it reversed the judgment in their favor against Adler, one of the transferees of the accounts. Upon the ground that there was no proof of fraud, it also reversed it against the transferee of the real estate.

This decision was embodied in an instrument made the 30th day of December, 1898, entitled an "order," but which, after reciting the necessary facts, "ordered and adjudged" that the judgment of the trial term be modified as stated, and also "ordered and adjudged" that the transfers in question, except the transfer of the real estate, were fraudulent and void as to Metcalf Brothers & Co.; that the receivers be, and they were thereby, directed to pay to Metcalf Brothers & Co. the amount of their judgments, with costs, and that final judgment should be entered in accordance therewith. This instrument was filed in the office of the clerk of the appellate division of the supreme court of New York, and was the only paper signed by that court or kept in its records. A certified copy of it was
6 transmitted to the clerk of the supreme court, upon which, after the costs had been taxed, a final judgment was entered by the latter clerk on the 31st day of January, 1899, following in all essential respects its verbiage. The delay in the entry of final judgment was caused by various motions before the appellate division for reargument.

On the 12th day of May, 1899, Lesser Brothers filed in the district court of the United States for the southern district of New York a petition to be adjudged bankrupts, and they were adjudicated bankrupts on that day. Subsequently, and on the 7th day of June, 1899, Benjamin Barker, Esq., was appointed their trustee in bankruptcy.

From the judgment of the appellate division in the action brought by Metcalf Brothers & Co. all parties except Lilianthal, the transferee of the real estate, appealed to the court of appeals of the State of New York. That court affirmed the judgment of the appellate division in favor of Metcalf Brothers & Co., and also restored to them the rights awarded them by the judgment of the trial court, of which they had been deprived by the appellate division. The final result of the litigation was that the transfers in question were declared fraudulent and set aside in favor of Metcalf Brothers & Co. only; that as to all other persons they were (until impeached in a proper action) valid; that the receivers were directed to pay out of the funds in their hands to Metcalf Brothers & Co. the
7 amount of their judgments, and that those creditors could also proceed for the collection of their judgments, if necessary, against the transferees of the accounts and real estate.

The decision of the court of appeals was made on the 6th of February, 1900. The remittitur from that court to the supreme court was received and filed on the 12th day of March, 1900. On the 8th day of March, 1900, the bankrupts' trustee, upon affidavits of himself and his counsel, procured from the district court of the United States for the southern district of New York an order entitled: In the bankruptcy proceeding requiring Metcalf Brothers & Co. to

show cause on the 13th day of March, 1900, why a writ of injunction should not issue enjoining them from taking any further proceedings under any judgment in their creditors' action and so enjoining them in the interim. This order provided for its service upon the members of the firm of Metcalf Brothers & Co., but it was not in fact served upon any one but their attorneys *in* their judgment creditors' action. Metcalf Brothers & Co. appeared specially upon the return day of the order to show cause and filed a written objection that the district court was without jurisdiction, power, or authority over them in the premises; that no action or other proceeding was pending or had ever been begun against them in any way relating to the subject-matter of the proposed injunction; that they had not appeared in or been made a party to any proceeding founded upon the petition of Lesser Brothers to be adjudged bankrupts, and that
8 they had not been brought into court on any process or been given any notice of the order to show cause except that their attorneys in their creditors' action had received a copy thereof, and especially that no statute conferred upon the district court jurisdiction, power, or authority to issue any writ of injunction in the premises.

Their objection was overruled, and after an argument of the merits of the application the injunction was continued.

Subsequently, Metcalf Brothers & Co. presented a petition to this court to superintend and revise in matter of law the said proceedings of the district court.

Questions Certified.

Upon the facts above set forth, the questions of law concerning which this court desires the instruction of the Supreme Court for its proper decision are:

1. Had the district court of the United States for the southern district of New York jurisdiction to make the injunction order in question?

2. If said court had jurisdiction to restrain Metcalf Brothers & Co. from receiving the fund in question, could such jurisdiction be exercised by summary proceedings?

3. Did Metcalf Brothers & Co. by the commencement of their creditors' action acquire a lien on the property of the bankrupts superior to the title of the trustee thereto?

4. If the lien acquired by the commencement of the creditors' action was inchoate merely, was it perfected by a judgment obtained more than four months prior to the filing of the petition of
9 the Lessers in bankruptcy within the meaning of the provisions of the act of Congress of July 1, 1898, known as the bankruptcy act?

5. If the lien acquired by the commencement of the creditors' action was inchoate merely, was the judgment in the creditors' action, whenever obtained, one which is avoided by any of the provisions of the act of Congress of July 1, 1898, known as the bankruptcy act?

In accordance with the provisions of section 6 of the act of March

3, 1891, establishing courts of appeal, &c., and of section 25 of the act of July 1, 1898, establishing a uniform system of bankruptcy, the foregoing questions of law are by the circuit court of appeals for the second circuit hereby certified to the Supreme Court.

E. HENRY LACOMBE,
U. S. Circuit Court.
N. SHIPMAN,
U. S. Circuit Judge.

10 UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing certificate was filed and entered of record in this office on the 5th day of March, one thousand nine hundred and one, and, as directed by the judges of said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

New York, March 5, 1901.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

11 [Endorsed:] United States circuit court of appeals, second circuit. In the Matter of Lesser Bros. Certificate. United States circuit court of appeals, second circuit. Filed Mar. 5, 1901. William Parkin, clerk.

Endorsed on cover: (Certificate.) File No., 18,077. U. S. C. C. of appeals, 2nd circuit. Term No., 592. Metcalf Brothers & Company, petitioners, *vs.* Benjamin Barker, Jr., trustee in bankruptcy of Lesser Brothers. Filed March 11th, 1901.

c. p. 57.

FILED
NOV 4 1902
JAMES H. McKENNEY
Clerk.

Opinions in Lower Courts.

Supreme Court of the United States.

OCTOBER TERM, 1902.

Filed Nov. 4, 1902.

IN THE MATTER

OF

TOBIAS LESSER, ISRAEL LESSER and SIMON LESSER, and the firm of LESSER BROTHERS,

Bankrupts.

APPLICATION

OF

METCALF BROTHERS & COMPANY, *Petitioners*, for Review of certain Proceedings, *etc.*

BENJAMIN BARKER, JR., Trustee in Bankruptcy,

Respondent.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

OPINIONS RENDERED IN THE COURTS BELOW.

ARGUED OCTOBER 30th, 1902.

C. G. BURGOYNE, Walker and Centre Street, N. Y.

Opinion rendered by the United States Circuit Court of Appeals and reported in 5 American Bankruptcy Reports, at page 320. This opinion was withdrawn and the questions certified to the United States Supreme Court.

United States Circuit Court of Appeals

SECOND CIRCUIT.

In the Matter
of
Lesser Brothers,
Bankrupts.

Petition of Manton B. Metcalf and others to review an order in bankruptcy of the District Court of the United States for the Southern District of New York.

Shipman, C. J.

This is an appeal from an order of the District Court of the United States for the Southern District of New York, whereby the members of the firm of Metcalf Bros. & Co., creditors of Lesser Brothers, bankrupts, were stayed from attempting to enforce an alleged lien in their favor by virtue of a judgment of

the Supreme Court of the State of New York upon their creditors' bill against the bankrupts.

The complicated facts in the case are stated in the opinion of the District Judge as follows:

> "On October 22nd and 29th, 1896, Metcalf Brothers & Company obtained judgments against the bankrupts in the Supreme Court of the State for the sums of $930.21 and $2,547.80 respectively, on which executions were issued and returned unsatisfied. Shortly before the entry of those judgments, viz., on October 2, 1896, Lesser Brothers being insolvent, confessed three judgments amounting in the aggregate to upwards of $18,000, upon which executions were on the same day issued and levies made by the Sheriff upon all the bankrupts' leviable property, consisting of a stock of clothing material, store furniture and fixtures. They also on the same day executed two assignments of a large amount of book accounts due the firm, and a deed of conveyance of premises 495 Manhattan Avenue and an assignment of the lease of premises 306 West Fifty-fifth street. On the same day also a partnership action was commenced for the dissolution of the firm, and on the same day by consent of the parties, Morris Moses was appointed receiver of the firm, and afterwards at the instance of some creditors, James T. Franklin was added as joint Receiver. Within a few days thereafter numerous actions for replevin were brought against the firm by creditors to recover back goods claimed to have been sold under fraudulent representations. The claims of the creditors to the goods were so conflicting that an action in equity was brought against them all by the partnership receivers in the State Court, and an injunction obtained against prosecuting the replevin suits, and an order was made on November 23, 1896, directing that certain of the goods claimed in replevin should be delivered to the claimants, and that the plaintiffs in the other actions in replevin might present their claims before a referee. The Receivers, the plaintiffs, were also appointed Receivers in their own suit, and were authorized to sell all the other goods, and to hold the proceeds in place of the goods, subject to the final order of the Court and subject to the

same liens as the goods. Under that order sales were made by the Receivers as authorized, and about $27,000, it is said, came into their hands as the proceeds thereof and of some other collections.

"Thereafter on December 19, 1896, Metcalf Brothers & Company, the judgment creditors, filed a creditor's bill in the State Court based upon their judgments of October 22nd and 29th, as above stated, against the partnership receivers and the persons to whom Lesser Brothers had confessed judgments and transferred the real estate, lease and book accounts as above stated, to have all those transfers declared fraudulent, as well as the partnership suit; and after trial, a decree therein was entered on April 6, 1898, adjudging the aforesaid assignments, confessions of judgment and transfers of the real estate, the lease and the accounts, fraudulent as against Metcalf and others, as well as against the partnership Receivers. The decree also declared that the real estate and lease conveyed, as above stated, were subject to the lien of the plaintiff's judgments first above stated; and directed that all the other property or its proceeds should be paid over or accounted for to the partnership Receivers.

"No receiver was ever appointed in the suit of Metcalf. That decree gave no directions as to what the Receivers should do with the property; but the opinion of Judge RUSSELL shows that it was designed to be held by the partnership Receivers for the benefit of the partnership creditors *pro rata*; and that any payment or preference to the complainants in that suit was intentionally denied (*Metcalf vs. Moses*, 22 Misc. Rep., 664.)

"From the decree last mentioned an appeal was taken by both parties to the Appellate Division, upon whose decision a judgment or decree was entered on January 31, 1899, affirming the decree below as to the fraudulent character of the transactions above stated, but adjudging that the complainants were entitled to be paid the former judgments out of the funds in the hands of the partnership Receivers; but reversing the decree below as respects the two assignments to Adler and Lilienthal as being unnecessary for the complainants' relief (35 App. Div., 596; 55 N. Y. Supp., 179). An appeal was

thereupon further taken by both parties to the Court of Appeals, which affirmed the judgment of the Appellate Division directing payment of the complainants' claims and adjudging all the transactions fraudulent, including also the appointment of the Receivers in the partnership suit as a fraud and imposition upon the Court. The remittitur from the Court of Appeals was filed a few days since, on or about March.

"While the latter appeal was pending in the Court of Appeals, Lesser Brothers filed their petition in bankruptcy in this Court on May 12, 1899, which was less than four months after the decree of the Appellate Division adjudging payment to Metcalf & Company out of the fund in the Receivers' hands; and the firm and its members were on the same day adjudicated bankrupts, and on the 7th day of June, 1899, Mr. Barker was appointed trustee.

"The present Bankruptcy Act (Section 67f), unlike the previous Acts of 1841 and 1867, declares that all judgments, attachments or other liens obtained through legal proceedings, etc.; within four months prior to the petition in bankruptcy 'shall be deemed null and void, * * * and the property affected by the levy, judgment, attachment or other lien shall be wholly discharged and released from the same and shall pass to the trustee as a part of the estate of the bankrupt, unless the Court shall on due notice order that the right under such lien, judgment, etc., shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the Court may order such a conveyance as shall be necessary to carry the purposes of this section into effect.' "

The District Court ordered that Metcalf Brothers & Co. should be enjoined from collecting under the judgment entered on January 31, 1899, from the Receivers any moneys in their hands as Receivers, but could proceed against the executors of Joseph Lilienthal to enforce their liens upon the real estate which had been fraudulently transferred by Lesser Brothers.

In the carefully stated opinion of the District Judge

(100 Fed. Rep., 433) upon the legal questions involved in this appeal we concur, and our conclusions can be stated as follows:

1. Inasmuch as the petition in bankruptcy was filed on May 12, 1899, less than four months after the entry of the decree of the Appellate Division which directed payment to Metcalf Brothers & Co. of their judgments at law, their inchoate lien upon the fund of $27,000 in the hands of the Receivers was discharged and released.

By Section 67*f* all liens obtained through legal proceedings within four months prior to the petition in bankruptcy become void, and the property affected by the judgment is released from the lien, but it is said that the equitable lien of the Metcalfs was obtained in December, 1896, when the creditors' bill was brought. It is true, that by the commencement of a creditors' bill in equity, the complainants acquire what is called an equitable lien upon the choses in action and equitable assets of the debtor, which simply means a right to a decree for priority of payment, in case of success, over other creditors. It is sometimes called an inchoate lien, or a contingent lien, but it is not a right in, or a right to hold a particular article of property. It is not like the lien obtained by the attachment of personal property in an action at law by virtue of which the Sheriff obtains either actual or constructive possession of the property attached, and in such case the lien is not obtained by the judgment, but by the attachment, and we are not now prepared to say that if the judgment is rendered within four months before the petition in bankruptcy is filed that the lien by attachment is vacated.

The so-called equitable lien under a creditor's bill upon the choses in action and equitable assets of the debtor is simply a right, "in the successful event of the action to priority of payment thereout, in preference to other creditors, irrespective of the priority of the respective judgments" (*First National Bank vs. Shuler*, 153 N.

Y., 163, 171). If the court which rendered the decree had power to create priority, the right to priority is perfected, but, if the judgment, so far forth as it directs priority, becomes waste paper, the lien is gone. In this case, it is not necessary to say that the entire judgment is null and void, because the judgment was to the effect that the transfers and assignments of personal property and the receiverships were fraudulent and void, and this part of the judgment is not affected by the Bankrupt Act. The lien, however, which was created by the judgment has become discharged by the provisions of section 67, and the Metcalfs cannot have the benefit of the decree which directs payment to them of their judgments in the actions at law because the preference created by the decree was made null by the Bankrupt Act.

2. The District Court had jurisdiction to stay the appellants by virtue of its power as a court of bankruptcy.

Inasmuch as the fund was in the custody of the State Court and had been in such custody prior to the institution of the proceedings in bankruptcy, it was proper to make no order in regard to the action of that court, but to direct the trustee in bankruptcy to apply to it for its order upon the receivers to make payment to him and, as Section 67 gives the court of bankruptcy power to make orders in the premises, it was also proper for that court to proceed as a court of bankruptcy, by order on notice upon a summary petition, and direct the Metcalfs not to go into the State Court upon their own motion and attempt to obtain payment. Subdivision 7 of Section 1 defines "court" to mean the court of bankruptcy in which the proceeding is pending, and to the court of bankruptcy power is specifically given by subdivision 15 of Section 2 " to make such orders, in addition to those specifically provided for, as may be necessary for the enforcement of this act." If this order is to be regarded as an injunction to stay pro-

ceedings of the State Court, it was authorized by clause 3 of the Twelfth General Order in Bankruptcy, which provides that applications to the Court of bankruptcy for an injunction to stay proceedings of a court of the State shall be heard and decided by the Judge.

In this case, the appellants have, by a litigation which lasted about three and one-fourth years and went through two Appellate Courts, obtained, without aid from any other creditor, a fund of $27,000 for the benefit of all the creditors from fraudulent insolvents, who, at the last moment went into bankruptcy, apparently to prevent the appellants from obtaining a substantial benefit from the protracted and expensive litigation. The outcome, so far as the appellants are concerned, seems inequitable. We think the order should be so modified as to permit them to become parties in the proceedings by the trustee in bankruptcy in the State Court, and present to that Court such considerations and facts as may bear upon an application for an allowance to them from the fund, in the nature of a reasonable compensation for their costs, expenses and disbursements in the litigation which resulted in the defeat of the fraudulent attempts of the bankrupts, in wresting the funds from the hands of receivers applied for in fraud of creditors and in its preservation for their actual benefit.

The order of the District Court appealed from is modified without costs of this Court by adding the clause as follows : " The trustee, however, shall make the said Manton B. Metcalf, Stephen A. Metcalf, Jesse H. Metcalf, and Edwin R. Dillingham and the firm of Metcalf Brothers & Company parties to any proceedings he may institute in the State Court to obtain money in the hands of the receivers, and the said appellants are allowed to appear in said court, make application for an allowance to them from said fund, as a reasonable compensation for their costs, expenses and disbursements in the litigation in the State Court, and obtain such allowance if in the opinion of the State Court it is proper and within its power to grant."

Opinion of the District Court, Reported in 100 Federal Reporter at Page 433.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

OF

TOBIAS LESSER and others, bankrupts.

Petition of BARKER, Trustee.

In Bankruptcy. Stay of Creditor's Bill.

ANDERSON & ANDERSON for Barker.

STICKNEY, SPENCER & ORDWAY for Judgment Creditors.

HENRY V. ROTHSCHILD for Stieglitz & Ballin.

BROWN, J.—This is an application to the Court by a trustee in bankruptcy of Lesser Brothers upon an order directing Metcalf Brothers & Company, judgment creditors of the bankrupts, to show cause why further proceedings by them upon a judgment creditors' bill, pending in the Supreme Court of the State and seeking to have applied to their judgment certain assets of the bankrupts fraudulently conveyed, should not be stayed. A temporary injunction was granted until the hearing and decision of this motion. The facts are somewhat complicated, and the dates of the several proceedings, as well as the kind of assets affected, are important.

On October 22nd and 29th, 1896, Metcalf Brothers

& Company obtained judgments against the bankrupts in the Supreme Court of the State for the sums of $930.21 and $2,547.80 respectively, on which executions were issued and returned unsatisfied. Shortly before the entry of those judgments, viz., on October 2, 1896, Lesser Brothers being insolvent, confessed three judgments amounting in the aggregate to upwards of $18,000 upon which executions were on the same day issued and levies made by the Sheriff upon all the bankrupts' leviable property, consisting of a stock of clothing material, store furniture and fixtures. They also on the same day executed two assignments of a large amount of book accounts due to the firm, and a deed of conveyance of premises 495 Manhattan avenue and an assignment of the lease of premises 306 West Fifty-fifth street. On the same day also a partnership action was commenced for the dissolution of the firm, and on the same day, by consent of the parties, Morris Moses was appointed Receiver of the firm, and afterwards, at the instance of some creditors, James T. Franklin was added as joint Receiver. Within a few days thereafter numerous actions of replevin were brought against the firm by creditors to recover back goods claimed to have been sold under fraudulent representations. The claims of the creditors to the goods were so conflicting that an action in equity was brought against them all by the partnership receivers in the State Court, and an injunction obtained against prosecuting the replevin suits, and an order was made on November 23, 1896, directing that certain of the goods claimed in replevin should be delivered to the claimants, and that the plaintiffs in the other actions in replevin might present their claims before a referee. The Receivers, the plaintiffs, were also appointed Receivers in their own suit, and were authorized to sell all the other goods, and to hold the proceeds in place of the goods, subject to the final order of the Court and subject to the same liens as the goods. Under that order sales were made by the Receivers as author-

ized, and about $27,000, it is said, came into their hands as the proceeds thereof and of some other collections.

Thereafter, on December 19, 1896, Metcalf Brothers & Company, the judgment creditors, filed a creditors' bill in the State court based upon their judgments of October 22nd and 29th, as above stated, against the partnership receivers and the persons to whom Lesser Brothers had confessed judgments and transferred the real estate, lease and book accounts as above stated, to have all those transfers declared fraudulent, as well as the partnership suit; and after trial, a decree therein was entered on April 6, 1898, adjudging the aforesaid assignments, confessions of judgment and transfers of the real estate, the lease and the accounts, fraudulent as against Metcalf and others, as well as against the partnership Receivers. The decree also declared that the real estate and lease conveyed, as above stated, were subject to the lien of the plaintiffs' judgments first above stated; and directed that all the other property or its proceeds should be paid over or accounted for to the partnership Receivers. No receiver was ever appointed in the suit of Metcalf. That decree gave no directions as to what the Receivers should do with the property; but the opinion of Judge RUSSELL shows that it was designed to be held by the partnership Receivers for the benefit of the partnership creditors *pro rata;* and that any payment or prefence to the complainants in that suit was intentionally denied (Metcalf *vs.* Moses, 22 Misc. Rep., 664).

From the decree last mentioned, an appeal was taken by both parties to the Appellate Division, upon whose decision a judgment or decree was entered on January 31, 1899, affirming the decree below as to the fraudulent character of the transactions above stated, but adjudging that the complainants were entitled to be paid their original judgments out of the fund in the hands of the partnership Receivers; but reversing the decree below as respects the two assignments to Adler and Lilienthal as being

unnecessary for the complainants' relief (35 App. Div., 596; 55 N. Y. Supp., 179). An appeal was thereupon further taken by both parties to the Court of Appeals, which affirmed the judgment of the Appellate Division directing payment of the complainants' claims and adjudging all the transactions fraudulent, including also the appointment of the Receivers in the partnership, suit as a fraud and imposition upon the Court. The remittitur from the Court of Appeals was filed a few days since, on or about March,

While the latter appeal was pending in the Court of Appeals, Lesser Brothers filed their petition in bankruptcy in this Court on May 12, 1899, which was less than four months after the decree of the Appellate Division adjudging payment to Metcalf & Company out of the fund in the Receivers' hands; and the firm and its members were on the same day adjudicated bankrupts, and on the 7th day of June, 1890, Mr. Barker was appointed trustee."

The present Bankruptcy Act (Section 67*f*), unlike the previous Acts of 1841 and 1867, declares that all judgments, attachments or other liens obtained through legal proceedings, etc., within four months prior to the petition in bankruptcy

> "shall be deemed null and void * * * and the property affected by the levy, judgment, attachment or other lien shall be wholly discharged and released from the same and shall pass to the trustee as a part of the estate of the bankrupt, unless the Court shall on due notice order that the right under such lien, judgment, etc., shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the Court may order such conveyance as shall be necessary to carry the purposes of this section into effect."

This provision, it has been held, applies to voluntary petitions. Section 70 declares that the trustee

shall be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, to all

> " (4) property transferred by him in fraud of his creditors."

The Court of Appeals having finally adjudged that all the conveyances above specified and the partnership receivership were fraudulent and void as to creditors, the trustee in bankruptcy is entitled by operation of law (Section 70*e*), to avail himself of the benefit of that adjudication in like manner as any judgment creditor of the bankrupt. The fund in question and the property transferred should, therefore, be delivered over to Mr. Barker as trustee in bankruptcy, subject only to any valid liens or charges against it. Upon the above facts what lien, if any, have Metcalf & Company, the judgment creditors, upon the fund in the hands of the partnership receivers?

No doubt by the recognized law of this State, creditors on filing a creditor's bill to reach equitable assets, or a fund not subject to a levy and sale on execution, acquire by filing the bill what is termed an equitable lien, which gives them on obtaining a decree a priority over other creditors subsequently seeking relief against the same fund. This equitable lien, however, is not a *jus in re;* it is not a vested property right like the common law lien of a person in possession for labor or care or maintenance, nor like a maritime lien or hypothecation with a similar vested property interest without possession; it is nothing more than a provisional equitable attachment of the fund for the purpose of satisfying any decree that may be obtained in that cause. It is, therefore, contingent upon the recovery of a valid judgment, and liable to be defeated by anything that defeats the judgment, or the right of the complainants to appropriate the fund. This is clear from the authorities and from the history of the growth of the recognition of this lien. (See Becker *vs.* Torrance, 31 N. Y., 631, 637; Lynch *vs.*

Johnson, 48 N. Y., 27, 33; Bank, &c., *vs.* Shuler, 153 N. Y., 163, 171; Ex parte Foster, 2 Story 131, 9 Fed. Cas., 508, where this subject is elaborately discussed; Smith *vs.* Gordon, 22 Fed. Cas., 554; Ex parte Waddell, 28 Fed. Cas., 1312, per BETTS, *J.*). In Edmonston *vs.* McLeod (16 N. Y., 543) this point was in effect directly adjudged, it being held that a final order appointing a receiver in supplementary proceedings (equivalent to a creditors' bill) was essential to perfect the equitable lien; and that as this had not been done, but the proceedings had been virtually abandoned, the defendant who had been in possession of the fund with notice of the proceedings, and having disposed of it, was not answerable to the plaintiff.

In the opinion of Judge RUSSELL in this very case also (22 Misc. Rep., p. 667) he says that

> " The plaintiffs here can only claim an equitable lien such as is ordinarily impressed upon property by a favorable judgment following the filing of a creditors' bill";

and in the opinion of the Appellate Division, RUMSEY, *J.*, it is said:

> " There is no logical or legal reason why the Court * * * should practically deprive them (the complainants) of the lien upon the property in the hands of the Receivers which they otherwise would have acquired by the entry of this judgment " (35 App. Div., 606).

Such a contingent or equitable lien, it is evident, cannot be superior to the judgment on which it depends to make it effectual, but must stand or fall with the judgment itself. Section 67*f*, therefore, in declaring that a judgment recovered within four months " shall be deemed null and void " &c., necessarily prevents the complainants from acquiring any benefit from the lien, or the fund attached, except through the trustee in bankruptcy *pro rata* with other creditors,

which in effect accomplishes the same result as the original judgment of RUSSELL, J., at Special Term.

Suppose that in an action for libel, or slander, or for a penalty, or for any other action that would die with the person, an attachment were levied for the full amount of the claim, as may be done in many of the States, Connecticut for example, although attachments in such cases are not allowed under the Code in New York; if the party die before judgment, and the action could not be revived, it is manifest that the attachment must fall; not because the attachment was not valid, but because no lawful judgment could be obtained to which it can be applied. And so if an undertaking had been given for a release of the property attached, manifestly the undertaking would also become null and void by the abatement of the action before judgment.

It cannot be otherwise here, since the only existing judgment by which this lien or the fund thereby attached could be made available to the plaintiffs, was recovered within less than four months of bankruptcy proceedings. The judgment at Special Term did indeed direct the property to be turned over or accounted for to the partnership receivers. That judgment was more than four months before the bankruptcy; and if still remained in force, it would be valid as against the trustee in bankruptcy, although as above stated it would result, as in bankruptcy, in an equal distribution among creditors, without preference to the complainants. But that judgment has been reversed by the Appellate Division, and the latter judgment was in that regard affirmed by the Court of Appeals. The result, therefore, is that there is no judgment authorizing payment of this fund to the complainants, or to any persons for their benefit, except the judgment entered within less than four months of the proceedings in bankruptcy, and that judgment, so far as it confers any preference upon the complainants, is made null and void by Section 67*f* of the Bankrupt Act.

The case of Brown *vs.* Nichols (42 N. Y., 26), is in

no way adverse to the above conclusion, but in entire accord with it. There the judgment debtor having died during the action, the suit was revived against his administrator ; and it was held that the lien acquired by the filing of the creditor's bill before his death, also survived and was applicable on the judgment afterwards obtained against the administrator. In that case there was nothing to prevent the rendition of a valid judgment through the revival of the action ; and the prior lien therefore remained available, and the administrator, it was held, took the assets charged with that lien. And such plainly would have been the result under the Act of 1867, which did not invalidate judgments acquired within four months like the present act. The fund here in question, therefore, having vested in the trustees in bankruptcy, though charged with an inchoate equitable lien, in case the plaintiff could legally make it available, is freed from it because the plaintiff did not recover and cannot recover any judgment by which they can avail themselves of it as against the trustee in bankruptcy.

As there are other suits and liens, however, affecting the fund in question, this Court should order, in accordance with the further provisions of Section 67*f*, that the right of the complainants under the lien and judgment "shall be preserved for the benefit of the bankrupts' estate," and such "conveyance thereof as shall be necessary" for that purpose.

Objection was interposed at the outset in behalf of Metcalf & Co., the complainants in the creditors' bill, that this Court has not jurisdiction over them to make any order in the premises. But Metcalf & Company, as creditors, are of necessity parties to the proceedings in bankruptcy ; and aside from this, if the above view of the legal rights of the parties is correct, it is manifest from the terms of the act that the Court has jurisdiction to restrain any person from illegally possessing himself of assets and depleting the estate, contrary to the terms of the act, and in fraud of the rights of other creditors (Sections 2 (6), (7), (15) ; Section 67*f* ;

In re Fellerath, 95 Fed., 121 ; *In re* Kenney, 95 Fed., 427).

The above ruling does not affect the complainants' right under their original judgments of November, 1896, to proceed by execution against the real estate on which those judgments were a legal lien. The effect of the decrees in the creditors' suit will moreover be to clear away the cloud upon the title of the real estate created by the fraudulent conveyances, and enable them to sell the property clear of that apparent charge, and subject only to prior legal encumbrances, if any. To that extent the stay should be modified and permit the entry of a further judgment, if that be necessary, adjudging all of said transfers and assignments and the receivership to be fraudulent and void.

It is not necessary to consider, in view of the above conclusion, whether the proceeds of the goods and chattels sold by the Receivers under the order of the Supreme Court, should be deemed still to retain their character as chattels, or as being equitable assets in the Receivers' hands.

Although the partnership Receivers under the adjudication of the Court of Appeals have no legal title to the property, they are still the custodians of it, as officers of the State Court appointed in the second equity suit as above stated. The fund is, therefore, in the custody of the State Court and the trustee should apply to that Court to make the proper order for the payment thereof by its Receivers to the trustees, in whom it is vested by the Bankrupt Act. The obligations of the Bankrupt Act are as binding upon that Court as upon this ; and it is not to be doubted that on proper application the State court will give appropriate directions (*Ex parte* Waddell, Fed. Cas. No. 17,027).

In cases of this character where the party on whom the burden has fallen loses the fruits of laborious litigation, and the full benefit of it accrues to others, it is competent for the Court to make a reason-

able allowance as indemnity for the costs and expenses by which these benefits have been obtained; and accordingly if the funds above named are turned over to the trustee without further unnecessary costs or expenses to the estate, such an allowance should be provided for on the settlement of the order to be entered hereon.

An order in accordance herewith may be submitted for settlement on two days' notice.

March 23, 1900.